

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Christopher M. Gallant et al.
Patent No. : 7,478,460
Issue Date : January 20, 2009
Serial No. : 10/785,133
Filed : February 24, 2004
Title : SHEAR FASTENERS

Art Unit : 3677
Examiner : Ruth C. Rodriguez
Conf. No. : 1633

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)

Patentee hereby requests reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent. Reconsideration of the final PTA calculation to increase total PTA from 366 to 524 days, is respectfully requested.

REMARKS

“A Delays” are defined as delays by the U.S. Patent and Trademark Office (PTO) under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. “B Delays” are defined as delays by the PTO under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than three year application pendency. To the extent that the periods of delay overlap, the period of any term adjustment shall not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b)(2)(A). As outlined in Wyeth et al. v. Jon W. Dudas (U.S. District Court, D.C., CA No. 07-1492, Mem. Op. September 30, 2008, 580 FSupp2d 138; 88 USPQ2d 1538), the only way that these periods of time can “overlap” is if they occur on the same day. If an “A delay” occurs on one calendar day and a “B delay” occurs on another calendar day, they do not overlap and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. Id.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, apparently relies on the premise that the application was delayed under 35 U.S.C. § 154(b)(1)(B) *before* the initial three-year period expired. The Wyeth v. Dudas court determined that this construction cannot be squared with the language of

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35 U.S.C. § 154(b)(1)(B), which applies “if the issue of an original patent is delayed due to the failure of the United States Patent and Trademark Office to issue a patent within 3 years.” “B delay” begins only after the PTO has failed to issue a patent within three years, not before. *Id.*

REVIEW OF PATENT TERM ADJUSTMENT CALCULATION

“A Delay”

A first PTO action was due on or before April 24, 2005 (the date that is fourteen months after February 24, 2004, the date on which the application was filed). The PTO mailed the first non-final Office Action on September 20, 2005, thereby according a PTO Delay of 149 days. Patentee does not dispute the PTO’s calculation for this “A Delay” from April 25, 2005 (the day after the date that is fourteen months after the date on which the application was filed), to September 20, 2005. See 37 C.F.R. §§ 1.702(a)(1) and 1.703(a)(1).

A PTO action was due on or before February 16, 2007 (the date that is four months after October 16, 2006, the date on which a response to Office Action was filed). The PTO mailed a non-final Office Action on July 11, 2007, thereby according a PTO Delay of 145 days. Patentee does not dispute the PTO’s calculation for this “A Delay” from February 17, 2007 (the day after the date that is four months after the date on which a response to Office Action was filed), to July 11, 2007. See 37 C.F.R. §§ 1.702(a)(2) and 1.703(a)(2).

In view of the periods of “A Delay” detailed above, the total “A Delay” for this patent should be calculated as 294 days (i.e., the sum of 149 days and 145 days).

“B Delay”

The period beginning on February 25, 2007 (the day after the date that is three years after the date on which the application was filed), and ending January 20, 2009 (the date the patent was issued), is 696 days in length.

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“B Delay” may not include the number of days in the period beginning on the date on which a Request for Continued Examination was filed and ending on the date the patent was issued. In the present application, a Request for Continued Examination was filed on April 8, 2008, and the patent issued on January 20, 2009, which resulted in a period of 287 days that must be excluded from the three year delay calculation. See 37 C.F.R. §§ 1.702(b)(1) and 1.703(b)(1).

“B Delay” for this patent is therefore calculated as 696 days minus 287 days, for a total of 409 days. The PTO calculated only 115 days of delay for issuance of a patent more than three years after filing. Patentee respectfully submits that the PTO’s calculation of this “B Delay” is incorrect and that the correct PTO Delay for issuance beyond three years from filing is 409 days.

Overlap of “A Delay” and “B Delay”

The “A Delay” and the “B Delay” overlap (i.e., occur on the same calendar day) for a total of 137 days, from February 25, 2007, to July 11, 2007.

Applicant Delay

A reply to an Office Action was due on or before December 20, 2005 (the date that is three months after September 20, 2005, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on December 22, 2005, thereby according an Applicant Delay of 2 days. Patentee does not dispute the PTO’s calculation for this Applicant Delay from December 21, 2005 (the day after the date that is three months after the date on which the Office Action was mailed), to December 22, 2005. See 37 C.F.R. § 1.704(b).

A reply to an Office Action was due on or before June 14, 2006 (the date that is three months after March 14, 2006, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on June 16, 2006, thereby according an Applicant Delay of 2 days. Patentee does not dispute the PTO’s calculation for this Applicant Delay from June 15, 2006 (the day after the date that is three months after the date on which the Office Action was mailed), to June 16, 2006. See 37 C.F.R. § 1.704(b).

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A reply to an Office Action was due on or before October 6, 2006 (the date that is three months after July 6, 2006, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on October 16, 2006, thereby according an Applicant Delay of 10 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from October 7, 2006 (the day after the date that is three months after the date on which the Office Action was mailed), to October 16, 2006. See 37 C.F.R. § 1.704(b).

A reply to an Office Action was due on or before October 11, 2007 (the date that is three months after July 11, 2007, the date on which the Office Action was mailed). Patentee filed a response to the Office Action on November 9, 2007, thereby according an Applicant Delay of 29 days. Patentee does not dispute the PTO's calculation for this Applicant Delay from October 12, 2007 (the day after the date that is three months after the date on which the Office Action was mailed), to November 9, 2007. See 37 C.F.R. § 1.704(b).

In view of the periods of Applicant Delay detailed above, the total Applicant Delay for this patent should be calculated as 43 days (i.e., the sum of 2 days, 2 days, 10 days, and 29 days).

Conclusion

In consideration of the events described above, Patentee believes the PTA calculation of 366 days is incorrect. As such, Patentee respectfully requests reconsideration of the PTA in the following manner:

- 1) Total PTO Delay should be calculated as 566 days (i.e., the sum of 294 days of "A Delay" and 409 days of "B Delay" minus the 137 days of overlap);
- 2) Total Applicant Delay should be calculated as 43 days; and
- 3) Total PTA should be calculated as 524 days.

This patent is not subject to a terminal disclaimer.

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Please apply the fee of \$200 required under 37 C.F.R. § 1.18(e) and any other required charges or credits to Deposit Account No. 06-1050, referencing attorney docket number 05918-0324001.

Respectfully submitted,

Date: March 10, 2009

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